State of Wisconsin
Governor Scott Walker

Department of Agriculture, Trade and Consumer Protection

DATE: October 2, 2017

TO: The Honorable Roger Roth
President, Wisconsin State Senate
Room 220 South, State Capitol
PO Box 7882
Madison, Wisconsin 53707-7882

The Honorable Robin Vos
Speaker, Wisconsin State Assembly
Room 211 West, State Capitol
P.O. Box 8953
Madison, WI 53708

FROM: Jeff Lyon, Interim Secretary
Steve Ingham, Division of Food and Recreational Safety Administrator

SUBJECT: **ATCP 74, Local Agents and Regulation**

At the July 20, 2017, DATCP Board meeting, the Board approved final rules related to local agents and regulation. The final rule was approved by the Governor on September 19, 2017.

Background

On July 1, 2016, Wis. Admin. Code Ch. DHS 192 and the section of Wis. Admin. Code Ch. ATCP 75 related to agent programs were combined to create a new Wis. Admin. Code Ch. ATCP 74, dealing with the relationship of the Department's new Division of Food and Recreational Safety ("DFRS") and its local health department agent programs. Under the authority of an approved DHS scope statement, the new DFRS is now revising Wis. Admin. Code Ch. ATCP 74.

Rule Content

The new rule standardizes language from Wis. Admin. Code Ch. ATCP 75 and Wis. Admin. Code Ch. DHS 192. It also standardizes, expands, and clarifies definitions of agent program terms. In doing so, it clarifies Department expectations for persons hired by an agent program to hold, or be eligible to work toward holding, the Registered Sanitarian ("RS") certification. The RS certification is the preferable credential to be held by agent-program sanitarians doing food inspections and the revised rule clarifies the Department's expectations regarding inspections done by those sanitarians who have not yet earned the RS certification, as well as the staffing procedures to be followed by an agent program, if certified RS staff leave the program.

The revised Wis. Admin. Code Ch. ATCP 74 also clarifies the Department's expectations for agent program inspection systems and databases, and spells out the terms to be covered by forthcoming Department-agent contracts. It adds a mandatory expiration date, after which the contract may be renewed. The rule clarifies the Department's expectations for an agent program seeking to enter into a contractual relationship and the procedures to enter into that agreement, and it clarifies the procedures for either or both entities to end the contractual relationship. The rule also updates and clarifies the roles that both the Department and the agent program shall play under the contractual relationship and the types of support, levels of training, and information that are to be shared by each of the partners in the contractual relationship.

This new rule clarifies the responsibilities of an agent program to enforce the Wisconsin Food Code, to inform the Department of its enforcement activities, and do such sampling as is required by the Department. It also clarifies the financial responsibilities of the agent program for that sampling. In addition, the new rule clarifies the responsibilities of the Department to provide general and specialized training, and laboratory support for the agent programs.

Wis. Admin. Code Ch. ATCP 74 further clarifies statutory requirements, including reimbursements owed to the Department, the payments for services the agent program may be required to make to the Department, and the types of financial records that the agent program shall make available to the Department upon request. In particular, it spells out the responsibility of the agent program to demonstrate that the fees charged by the local program are reasonable and used only for maintaining the local program.

Fiscal Impact

No new staff will be required for the department to enforce the proposed rule. The department will train staff in the new requirements, and the new requirements will be enforced as part of the agent program oversight and evaluation.

Small Business Regulatory Review Report

The Small Business Regulatory Review Board did not issue a report on this rule.

Economic Impact

This rule change is anticipated to have no impact on small business. This rule relates to the administration of the local agent program and has no direct impact on small businesses. However, the rule was posted for comment and many business entities provided feedback. All comments were taken into account, but fiscal issues raised by business (such as capping license fees charged by agent programs) were outside the scope of this rule.

Rules Clearing House Report

All changes suggested by the Legislative Council Rules Clearinghouse Report were implemented in the final rule, although some rule text was changed or deleted based on hearing comments after the report was received.

Changes from the Hearing Draft

There are no substantive policy or content changes from the hearing draft. DATCP did incorporate the technical corrections suggested by the Rules Clearinghouse. Other changes based on the public hearings and comments sent to the department are listed in **Appendix A.**

Comparison with Rules in the Federal Government and Adjacent States

The Federal Food and Drug Administration ("FDA") does not have jurisdiction over retail food establishments. The department uses the FDA's model *Food Code* as the basis for its *Wisconsin Food Code* (ATCP 75 Appendix) that spells out retail food establishment requirements. The department expects its agent programs to enforce the same standards in the *Wisconsin Food Code*.

Chapter ATCP 74 is intended to clarify the unique relationship between DATCP and the local health departments in Wisconsin that wish to act as an agent of DATCP based on Wisconsin statutes and rules. Local jurisdictions provide a different level of service in other states. Wisconsin's rules related to local health agents are not intended to be comparable to rules adopted in surrounding states, but to ensure that the local agent programs' practices are comparable to the department's practices.

Minnesota currently has only seven local health department agent programs that perform retail food establishment inspections under the oversight of the Minnesota Department of Agriculture (MDA). All other food-related inspections are completed under the oversight of the Minnesota Department of Health (MDH). The agent programs have their own fee structure and issue their own licenses. The MDA has taken parts of the 2005 FDA model *Food Code* and incorporated them into their administrative rules. They require a Registered Environmental Health Sanitarian (REHS) certification for inspection staff or a degree-equivalent in order to perform food inspections. They also require new hires without the REHS to earn that credential within two years and to operate under the supervision of a credentialed inspector until they earn the credential. The MDH has similar requirements.

Iowa also has agent program food inspectors regulating retail food establishments. The agent programs perform only retail food inspections, follow Iowa's state rules, and must use Iowa's inspection program. They must also use Iowa's fee structure for licenses. An RS or REHS certification or supervision by a certified person for food inspections is not required, but Iowa is working toward meeting Standard 2 (Trained Regulatory Staff) in the FDA's National Voluntary Program Standards. Iowa's policies and program expectations may change as the Iowa program meets FDA's retail food inspection regulatory standards.

Michigan allows local jurisdictions to perform only restaurant inspection. All other retail food establishment inspection is done by the state. Michigan does not require restaurant inspectors to hold an RS or an REHS credential, but does have state accreditation standards that are roughly similar, and requires twenty Continuing Education Units (CEUs) of on-going education per year as well as the successful completion of an audit. The agent programs are allowed to issue licenses and set fees.

Illinois does not perform any retail food inspection on a state level. Local programs perform all the retail and restaurant inspection. They do not issue licenses locally, but are funded by a state grant, the Local Health Program Grant. The state requires a Licensed Health Professional certification, which is Illinois' version of Wisconsin's RS or the national REHS. This certification requires five CEUs per year. The state evaluates the local programs at the same frequency Wisconsin does, and continuation of local programs depends on passing an evaluation.

Appendix A.

Public Hearings

The Department held four public hearings. Following the public hearings and the hearing record remained open until February 3, 2017. The following is a summary of the hearing attendees, including those who submitted written comments.

Public Hearing Summary

Date and Time	Location
Tuesday, January 17, 2017 10:00 a.m. to 1:30 p.m.	Room 106 (Board Room), Department of Agriculture, Trade and Consumer Protection 2811 Agriculture Drive Madison, Wisconsin 53718
Wednesday, January 18, 2017 10:00 a.m. to 1:30 p.m.	Portage County Court House 1516 Church Street Conf. Room D Stevens Point, Wisconsin 54481
Tuesday, January 31, 2017 10:00 a.m. to 1:30 p.m.	Wisconsin State Office Building, Room 129 718 West Clairemont Avenue Eau Claire, Wisconsin 54701
Wednesday, February 1, 2017 10:00 a.m. to 1:30 p.m.	Lake Michigan Room DNR Service Center 2984 Shawano Avenue Green Bay, Wisconsin 54313

List of Public Hearing Attendees and Commenters

The following is a complete list of the persons who attended the public hearing or submitted comments on the proposed rule during the public comment period, the position taken by the commenter and whether or not the individual provided written or oral comments.

Commenter #	**Name and Address**	**Position Taken** (Support or Opposed)	**Method of Commenting** (Oral or Written)
1.	Claire Evers 841 N. Broadway Milwaukee, WI 53202	Oppose	Written
2.	Beth Cleary 2300 S. Park Street, Room 2010 Madison, WI 53713	Oppose in part, Support in part.	Oral
3.	Michelle Kussow Wisconsin's Grocers Association 33 E Main Street, Suite 701 Madison, WI 53703	Support	Written and Oral
4.	Alicia Schweitzer WI Public Health Association (WPHA)/ WI Association of Local Health Departments and Boards (WALHDAB)	None	Observe
5.	Mark Melotik Kenosha Co. Division of Health 8600 Sheridan Road Kenosha, WI 53143	Support	Oral
6.	Kristen Walters Rusk Co. Public Health Dept.	Oppose part, support part	Oral
7.	Dave Roettger Representing himself as a Registered Sanitarian	Oppose part Support part	Oral
8.	Mike Lika, Chairperson Lincoln County Board of Health	None	Written
9.	Shelley Hersil, Health Officer/Director Lincoln County Health Department	None	Written
10.	Susan Quam, Executive Vice President Wisconsin Restaurant Association	None	Written
11.	Sue Galoff, Co-President John Smith, Co-President	None	Written

Commenter #	**Name and Address**	**Position Taken** (Support or Opposed)	**Method of Commenting** (Oral or Written)
	Wisconsin Association of Local Health Departments and Boards (WALHDAB)		
12.	Nancy Eggleston, President Wisconsin Public Health Association	None	Written
13.	Gloria Wall Crawford County Public Health	None	Written
14.	Laura Temke Wauwatosa, WI	None	Written
15.	Shane Sanderson	Supports in part	Oral
16.	KT Gallagher Eau Claire City-County health Department	Support with conditions	Written and Oral
17.	Jay Ellingson Kwik Trip	None	Written and Oral
18.	Jamie Michael Wisconsin Public Health Association/Wisconsin Association of Local Health Departments and Boards	None	Written
19.	Todd Troskey Oneida County Health Department	None	Written
20.	Carol Drury	Support in part Oppose in part	Written

Summary of Public Comments Resulting in Department Changes to Proposed Final Rule

The number(s) following each comment corresponds to the number assigned to the individual listed in the Public Hearing Attendees and Commenters section of this document.

Rule Provision	Public Comment Resulting in Change	Department Response
ATCP 74.18	Would like to have notification of at least one full licensing year before any policy or procedural changes that have a fiscal impact are made. (1, 2, 6, 8, 9, 11, 12, 14, 16, 18, 20)	The department agrees and included language under ATCP 74.18 and included facilitating language under ATCP 74.06 (7).
ATCP 74.04 (2)	The Wisconsin Grocers Association would like more stakeholder input in the process for initiating a contract with a local agent and also in fee increases. (3, 17)	The department agrees and included language under ATCP 74.04 (2).

Summary of All Public Comments and Department Responses

The number(s) following each comment corresponds to the number assigned to the individual listed in the Public Hearing Attendees and Commenters section of this document.

Rule Provision	Public Comment	Department Response
ATCP 74.08 (2)	The ability to hire non-Registered Sanitarian (RS) staff to perform inspections under the agent contract working under the supervision of the RS supervisor for low risk inspections. Would like the department to evaluate and certify these individuals annually or accept other program specific certifications. (1, 2, 6, 7, 8, 9, 11, 12, 13, 16, 18, 19, and 20)	The requirement that persons conducting environmental health inspections must meet a minimum standard for education and experience promotes statewide consistency and competence. That benefits industry, the public and the agencies. The registered sanitarian certification provides a broad-based level of knowledge needed to deal with a wide variety of environmental health issues. This certification provides a diverse set of skills that cover the numerous individual and specific certifications that exist on a less complex level. Implementing a nationally-recognized registered sanitarian credential provides a standard that is far superior to individual certification of agent technicians by the department. An individual with a RS is more cost-effective because he or she provides greater

Rule Provision	Public Comment	Department Response
		versatility than a technician specifically certified for a single program area. Department recommends No Change.
ATCP 74.18	Would like to have notification of at least one full licensing year before any policy or procedural changes that have a fiscal impact are made. (1, 2, 6, 8, 9, 11, 12, 14, 16, 18, 20)	The department agrees and included language under ATCP 74.18 and included facilitating language under ATCP 74.06 (7).
ATCP 74.04 (2)	The Wisconsin Grocers Association would like more stakeholder input in the process for initiating a contract with a local agent and also in fee increases. (3, 17)	The department agrees and included language under ATCP 74.04 (2).
General	Would also like to see a cap on fees and more specific language as to what fees can be covered. (3, 10, 17)	Agent fee authority language is beyond the scope of this rule and is found in s. 97.41 (4), Stats. Department recommends No Change.
General	Would like DATCP to require people who register for temporary events to also register with the city. Some alders are concerned that these events are not inspected but the city can't inspect them if they don't know where they are. (1)	This request is beyond the scope for ATCP 74, but the department will retain the comments for ATCP 75, the revision of which could address these concerns. Department recommends No Change.
General	Would like to add a provision that would have agents do a plan review or food service operation review in addition to a pre-licensing inspection to ensure facilities are up to code. (2, 20)	This request is beyond the scope for ATCP 74, but the department will retain the comments for ATCP 75, the revision of which could address these concerns. Department recommends No Change.
ATCP 74.08 (12)	The requirement to notify the state when there is a personnel change. Since new people use HealthSpace could that access to HealthSpace be sufficient notification? Or, there should be at least 30 days notice. Agents also notify the state annually	Information regarding inspection staff changes submitted to the department is important since staff are using the department's electronic inspection system. With today's technology, the department does not feel a 10 day notice of change creates undue burden to an agent health department.

Rule Provision	Public Comment	Department Response
	of any staff changes through the self-assessment. (5)	Department recommends No Change and reinserted original language that was removed in error.
General	State sometimes limits the number of people who can go to training, but then sometimes the state notes on self-assessment that not everyone is trained, but not everyone is allowed to go. Recommend the state provide more training. (5)	This request is beyond the scope for ATCP 74. The department take its training responsibilities very seriously and training is completed based on available staffing and budget. Department recommends No Change.
General	Supports the concept of agent programs, but believes there should be stronger oversight by DATCP and that consistency across jurisdictions is a major issue for the restaurant industry. (10)	The department agrees and that is the basis for the revision to ATCP 74. Department recommends No Change.
ATCP 74.20 (2) and (3)	Fees are based on cost of a program, they believe that there is a lot of leeway in how agents determine costs. They suggest that DATCP needs to place a cap on the maximum percentage of indirect costs that can be attributed to inspection programs. They also raised concerns about agent programs providing "free" training and the extent to which these training services may or may not be supported by licensing fees rather than other sources of funding. They suggest that the department provide more direction to agents regarding the services and programs that may provide as part of the inspection program. (10)	Part of this request is beyond the scope for ATCP 74. s. 97.615 (2) (d) sets out the provisions that Agents must follow with respect to fees charged by an Agent Health Department. The department also agrees that closer monitoring is necessary to determine "reasonable cost" and has included additional language in ATCP 74.20 (2) and (3) in this proposed rule. Department recommends No Change.
General	Concerns about the impact on licensing fees of implementing the FDA Voluntary National Retail Program Standards and suggest DATCP establish priorities and	This request is beyond the scope for ATCP 74. s. 97.615 (2) (d) sets out the provisions that Agents must follow with respect to fees and what services may be included in that license fee.

Rule Provision	Public Comment	Department Response
	provide direction, via contract, to the agent programs regarding the retail standards.	Individual Agent health departments determine what inspectional, licensing, educational and training materials they provide. Department recommends No Change.
ATCP 74.10 (7)	Agent should always be notified if the State plans to conduct activities in their jurisdiction	ATCP 74.10 (7) already indicates that "whenever possible" the department will notify the Agent. Due to the nature of certain investigations and operations the department is not always at liberty to notify an Agent health department of their activities in their area. Department recommends No Change.
General	All agents must be required to enroll in the retail food standards program and those standards evaluated annually. (17)	At this time the FDA retail food standards are a voluntary program. The department fully supports FDA's goals for the retail food standards, but until they become a required standard the department will continue to encourage agent health department's to enroll in the standards and continue to offer support and guidance in helping agent health department meet program standards. Part of the department's new evaluation process includes a review of progress made in complying with the standards. The standards process includes 9 goals that must be met in order to achieve compliance. Department recommends No Change.
ATCP 74.08	The ability to have the RS or other certifications tied to an ethics oath (15)	This request is beyond the scope for ATCP 74. The requirement suggested already exists for the RS through DSPS s. 440.98 Stat. that gives DSPS the ability to remove RS certification due to improper conduct. The State does not oversee any other certifications for performing activities in the field of environmental health and thus it has no ability or jurisdiction to remove those credentials. Department recommends No Change.